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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/665,670	09/18/2003	Heather Lynn Focht	9042M	8580
27752 7590 01/17/2007 THE PROCTER & GAMBLE COMPANY INTELLECTUAL PROPERTY DIVISION WINTON HILL BUSINESS CENTER - BOX 161 6110 CENTER HILL AVENUE CINCINNATI, OH 45224			EXAMINER CHANNAVAJALA, LAKSHMI SARADA	
			ART UNIT	PAPER NUMBER
			1615	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		01/17/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

# Office Action Summary

Application No.

10/665,670

Applicant(s)

FOCHT ET AL.

Examiner

Lakshmi S. Channavajjala

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 1/22/04, 1/23/04, 2/3/04, 4/5/04, 6/15/04, 11/22/04, 12/14/04, 3/29/05, 6/6/05, 7/28/05
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

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### DETAILED ACTION

Receipt of Information Disclosure Statements dated 1-29-04, 2-3-04, 4-5-04, 6-15-04, 11-22-04, 12-1-04, 3-29-05, 6-6-05 and 7-28-05 is acknowledged.

Claims 1-19 are pending in the instant application.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19 of U.S. Patent No. 6,673,755.

Although the conflicting claims are not identical, they are not patentably distinct from each other because of the following reasons: The patented claims are directed to a personal cleansing composition comprising a cleansing phase containing a cleansing surfactant and water; and an active agent comprising a lipophilic carrier and solid, non-structuring particulates. The lipophilic carrier of the patented claims has the same

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solubility parameters; shear Index and consistency value and further also comprise the same hydrophobic components as that of the instant claims (see dependent claims of the patent). While the patented claims recite that the two are physically separated from one another, the dependent claims (Patent) state that the phases are in a multi-stream package implying that the two streams can be applied at the same time or at different times. Instant claims require "striped" compositions and are silent regarding how the striped are formed. Instant claims constitute a genus that encompasses the claimed separately packaged, multi-stream composition because even a multi-stream packaged product (of the patented claims) results in a striped composition when the separately packaged products are applied together. Thus, the patented product anticipates instant composition.

Claims 1-19 are directed to an invention not patentably distinct from claims 1-19 of commonly assigned U.S. Patent No. 6,673,755.

The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP Chapter 2300). Commonly assigned U.S. Patent No. 6,673,755, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(e), (f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee can, under 35 U.S.C. 103(c) and 37 CFR 1.78(c), either show that the conflicting inventions

were commonly owned at the time the invention in this application was made, or name the prior inventor of the conflicting subject matter.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications pending on or after December 10, 2004.

Claims 1-19 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 and 22-39 of copending Application No. 10/699,469. Although the conflicting claims are not identical, they are not patentably distinct from each other because both instant and the co-pending application claim a striped personal cleansing composition comprising the same components i.e., a cleansing phase and a benefit phase, wherein the benefit phase has the same yield value, solubility parameters and Index value and are in the same forms i.e., a lotion, gel, etc. While the co-pending claims recite that the phases are in contact with each other, instant claims do not recite if the phases are separate or in contact with each other. Thus, the co-pending claims constitute a species of the instant generic composition and anticipate the instant claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-19 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19, 21 and 24-41 of copending Application No. 10/837201. Although the conflicting claims are not identical, they are not patentably distinct from each other because both instant and the co-pending application claim a striped personal cleansing composition comprising the same components i.e., a cleansing phase and a benefit phase, wherein the two phases recite the same components such as those claimed in the instant claims (dependent claims of the patent) and hence would have the same physical properties such as viscosity, solubility, Index value etc., as that claimed in the instant. While the co-pending claims recite that the phases are in contact with each other, instant claims do not recite if the phases are separate or in contact with each other. Thus, the co-pending claims constitute a species of the instant generic composition and anticipate the instant claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3-7, 9, 15, 16 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated US 6,174,845 to Rattinger et al (Rattinger).

Rattinger teaches a personal washing (cleansing) bar composition comprising an emollient added to a base bar composition and forms stripes in the final bar composition (col. 2, L 27-45). The base bar composition constitutes 40% to 99% by weight and is comprised of a surfactant selected from anionic, nonionic, amphoteric etc., and water. The emollient or benefit phase constitutes upto 40% emollient and in addition contains a carrier, structuring agent /filler etc (col. 2, L 46-63). The emollient or benefit agent that can be suitably incorporated in the emollient phase includes oils, gums, waxes, lipids, hydrophobic plant extracts, paraffin etc. Instant specification describes certain hydrophobic materials that possess the claimed solubility parameter (page14) and because the same hydrophobic materials are also employed by Rattinger (entire col. 4), hence the claimed solubilities, Shear Index and consistency values (claims 7-8) are inherent to the emollients of Rattinger. The emollient phase of the bar composition comprises water in an amount of 0 to 10% and thus is not an essential component. Thus, the bar composition reads on the instant "anhydrous" composition. Further, the emollient composition of Rattinger does not contain a surfactant and thus meets instant claim 4. With respect to claims 15 and 16, the bar composition of Rattinger form stripes. With respect to claim 19, the claimed method of using the composition is inherent to the bar soap of Rattinger, because the composition is meant to be used by applying the required amount and rinsing the skin or hands with the water after washing.

Claims 1-9, 14-16 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated US 5,612,307 to Chambers et al (Chambers).

Chambers discloses an aqueous composition that comprises a cleansing portion and a moisturizing potion, wherein the former comprises 1% to 35% surfactant, water, thickener such as gaur gum (col. 2, col. 3, L 15-16, example formulation B of col. 8) and the latter comprises an emollient that reads on the instant hydrophobic material because Chambers discloses the same oils, lipids etc., that are described in the instant invention (col. 2). The composition of Chambers upon dispensing forms individual stripes of the benefit agent and base formulation (surfactant). The benefit phase of Chambers does not contain water or surfactants and hence reads on claims 3 and 4 (examples in col. 11, L 11-20). Instant specification describes certain hydrophobic materials that possess the claimed solubility parameter (page14) and because the same hydrophobic materials are also employed by Rattinger (entire col. 4), hence the claimed solubilities, Shear Index and consistency values (claims 7-8) are inherent to the emollients of Chambers. With respect to claims 15 and 16, the composition of Chambers form stripes. With respect to claim 19, the claimed method of using the composition is inherent to the composition of Chamber, because the composition is meant to be used by applying the required amount and rinsing the skin or hands with the water after washing.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 17 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,612,307 to Chambers et al (Chambers).

Chambers fail to teach storing or packaging the composition in a transparent container or in a container with instructions to hold the container in an upside down position. However, Chambers teaches a formulation that is also used for the same purpose as claimed i.e., cleansing and in the absence of any unexpected advantage mere modification in the aesthetic design or appearance of the composition without affecting the mixing of the phases (benefit and base surfactant phases) and retaining

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the ability to pump the composition in stripes (desired by Chambers) would have been within the scope of a skilled artisan.

Claims 10-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,612,307 to Chambers et al (Chambers) in view of US 2003/0180246 to Frantz et al (Frantz).

Chambers discussed above fails to teach the claimed composition with the cleansing phase containing an alkanolamides, wherein the phase is non-Newtonian shear thinning with the viscosity of equal to or greater than 3000 cps.

Frantz teaches a stable surfactant composition for suspending components in compositions such as shampoos, cleansers, body washes etc., including striped compositions (abstract, para 0122). Frantz teaches that the surfactant containing suspending formulations (reads on instant cleansing phase) comprise an anionic surfactant, water, electrolyte and an alkanolamide, for imparting a free-flowing non-Newtonian shear thinning property to the composition (abstract, 0017-0048). In particular, the alkanolamides of 0045 have the same structure as that described in the instant specification and also employed for the same purpose as claimed. Therefore, it would have been obvious for one of an ordinary skill in the art at the time of the instant invention was made to employ the alkanolamide of Frantz in the cleansing phase of Chambers because Frantz suggests that the suspending phase comprising alkanolamide in addition to an anionic surfactant, water and an electrolyte (the cleansing phase of Chambers contain all three components) impart a free-flowing and

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non-Newtonian shear thinning property that provides the ability to suspend components or "benefit agents" such as oils, skin care agents etc (Frantz 0073-0076). A skilled artisan would have expected to achieve a free-flowing cleansing phase with a non-Newtonian shear thinning.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lakshmi S. Channavajjala whose telephone number is 571-272-0591. The examiner can normally be reached on 7.00 AM -4.00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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January 4, 2007

  
LAKSHMI S. CHANNAVAJJALA  
PRIMARY EXAMINER